

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

WHIMSEY MICHELLE AUSTIN,)	
)	
Petitioner,)	
)	1:11CV598
v.)	1:09CR261-2
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

O-R-D-E-R

The Recommendation of the United States Magistrate Judge was filed with the court in accordance with 28 U.S.C. § 636(b) and, on July 9, 2014, was served on the parties in this action. Petitioner objected to the Recommendation.

The court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination which is in accord with the Magistrate Judge's report. None of these objections has merit, though one objection arguably bears some minimal discussion. Specifically, Petitioner argues for the first time that her sentence was procedurally and substantively unreasonable. (Docket Entry 121 at 1-5.) To the extent this is an effort to amend her Petition to raise an additional claim it must be denied. A challenge to the reasonableness of her sentence is now time barred by the limitations statute and any such challenge does not relate back to the claims originally raised in her Petition. Additionally, even if this claim—which was also waived by virtue of Petitioner's plea agreement—could be raised, it fails on the merits, if for no other reason than Petitioner

received the statutory minimum sentence. In the absence of a substantial assistance motion by the Government, the Court lacked the authority to depart below the statutory minimum. *See United States v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005). The court therefore adopts the Magistrate Judge's recommendation.

IT IS THEREFORE ORDERED that Petitioner's Motion to Vacate, Set Aside or Correct Sentence (Docket Entry 67), Letter requesting a sentence reduction (Docket Entry 66), and Motion for Summary Judgment (Docket Entry 84) be **DENIED**, that Respondent's Motion to Dismiss and, in the Alternative, Response to Motion to Vacate, Set Aside or Correct Sentence (Docket Entry 79) be **GRANTED** insofar as it seeks denial of the § 2255 Motion on the merits, and that this action be DISMISSED. A judgment dismissing this action will be entered contemporaneously with this Order. Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is not issued.

This the 2nd day of March, 2015.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge